

## Summary

*The effectiveness of regulating military violence  
– Selected aspects related to the applicability and coherence of  
international humanitarian law –*

*by Prof. Dr. Andreas Zimmermann, LL.M. (Harvard)*

### A. Introduction

(1) The effectiveness of regulating military violence by international humanitarian law presupposes both its applicability and its coherence.

### B. Applicability of international humanitarian law as a prerequisite for its effectiveness

#### I. Applicability *ratione materiae*

1. ‚Vertical‘ Separation: Necessary prerequisites and possible limits of the applicability of international humanitarian law

(2) The threshold clause contained in Art. 1 Add. Prot. II has (partially) been superseded by customary law. Accordingly, customary rules of international humanitarian law, applicable in non-international armed conflicts, are to be applied whenever military violence is used by or against organised armed groups during a protracted period.

(3) ‚Transnational‘ armed conflicts involve situations in which a State uses military violence for a protracted period of time on foreign territory, the target of which, however, are armed non-State groups operating therein. The qualification of such conflicts as possessing either an international or a non-international character has however not yet been fully clarified by State practice.

(4) *De lege ferenda*, it is appropriate to lower the threshold for applying those rules of international humanitarian law which are applicable during non-international armed conflicts. Moreover, the challenge is to strive towards a harmonization of rules of international humanitarian law which are applicable to international and non-international armed conflicts.

(5) Setting aside international humanitarian law whenever the very existence of a State is (allegedly) at stake would run counter to the very purpose of international humanitarian law. Moreover, any such thesis would lack a normative underpinning.

2. ‚Horizontal‘ Separation: the interrelationship between international humanitarian law and other areas of international law

(6) The fundamental distinction between *jus ad bellum* and *jus in bello* must be retained, given that it is only this way that the effectiveness of international humanitarian law can be safeguarded over time.

(7) The exercise of the right of self-defence cannot justify violations of international humanitarian law.

(8) Even in cases of ‚humanitarian interventions‘, identical norms of international humanitarian law do apply.

(9) Definitions contained in arms control treaties may determine the content of obligations arising under international humanitarian law.

(10) Individual war crimes, attributable to a State, trigger the responsibility of the State concerned, even if the perpetrator is not punishable due to a defence arising under international criminal law. Every punishment of individuals, having acted as a State organ, presupposes, however, conversely, that the State concerned has incurred responsibility in accordance with applicable rules of State responsibility.

## II. *Applicability ratione personae*

### 1. Rules of Customary Law in international humanitarian law and persistent objection

(11) Those norms of international humanitarian law which are currently affected by persistent objection do not form part of *jus cogens*. Possible international humanitarian law obligations derived from the Martens' Clause are limited to the very core of international humanitarian law. Accordingly, no conflict arises between *jus cogens* and the Martens' Clause on the one hand, and international humanitarian law norms currently affected by persistent objection on the other.

(12) Signatory States to international law treaties cannot act as persistent objectors vis-à-vis customary law norms, the content of which originates from the treaty in question.

(13) The status as a persistent objector is lost, once a State accepts parallel norms of international criminal law.

### 2. International Humanitarian Law and Multilateral Military Operations

(14) An international organisation is liable for violations of international humanitarian law committed by multilateral troops, if they are being 'effectively controlled' by the organisation. A mere authorization, as well as mere reporting duties, are however not sufficient to provide for the liability of the organization.

(15) International organisations are only bound by those norms of international humanitarian law which form part of customary international law.

(16) Member States of the respective organisation, and especially States contributing troops, have the duty to ensure that the organisation abides by international humanitarian law. Moreover, a participation in multilateral operations may not lead to an impermissible limitation of the applicable standards of international humanitarian law.

### 3. The effectiveness of international humanitarian law and private military companies

(17) Violations of international humanitarian law, committed by members of private military companies cannot always be attributed to a State. Against this background, the obligation to ensure the respect of international humanitarian law contained in common Art. 1 of the four Geneva Conventions is of particular significance.

### **C. Intrinsic and external coherence of international humanitarian law as a prerequisite for its effectiveness**

#### **I. *Intrinsic coherence: International versus non-international armed conflicts between historical differences and increasing convergence***

(18) The threshold providing for the application of international humanitarian law in non-international armed conflicts has been significantly lowered. Besides, international humanitarian law norms, applicable to non-international armed conflicts, meanwhile also apply to military conflicts occurring between different non-State groups.

(19) It is to be welcomed that, as of today, applicable rules of both, treaty and customary law, no longer differentiate between international and non-international armed conflicts.

#### **II. *External coherence: (Possible) specific characteristics of the development of customary law in the field of international humanitarian law***

(20) The further development of customary law in the field of international humanitarian law provides for certain peculiarities. In particular, the jurisprudence of international criminal courts and tribunals plays a decisive role.

(21) State practice, the jurisprudence of courts and tribunals, the practice of organs of the international community, as well as treaties codifying international humanitarian law mutually reinforce themselves with regard to the creation and confirmation of customary law.

(22) The existence of customary law rules of international humanitarian law is increasingly deduced from, and based on, general principles and considerations of international law.

(23) The reception process of the ICRC Study proves its significance for the confirmation respectively the further development of customary law norms.

### **D. Concluding Remarks**

(24) Due to the continuous development and expansion of the field of application of customary law norms, the scope of application of international humanitarian law has largely been adapted to the necessities of modern forms of military conflicts.

(25) The fact that international humanitarian law is increasingly interwoven with other areas of international law further reinforces its effectiveness.

(26) The obligation to ensure respect contained in common Art. 1 of the four Geneva Conventions serves to restrict the use of military violence by third actors.